

No. 20427

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL UNION No. 11, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO,

Appellant,

vs.

G. P. THOMPSON ELECTRIC, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

BRUNDAGE & HACKLER,
ALBERT BRUNDAGE,
JULIUS REICH,

1621 West Ninth Street,
Los Angeles, Calif. 90015,

Attorneys for Appellant.

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APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the District Court for the Southern District of California which vacated, in part, an arbitration award [R. 92].

The appellant initiated this action in the Superior Court for the County of Los Angeles [R. 5] to confirm an arbitration award under section 301(a) of the Labor Management Relations Act, 61 Stat. 156 [29 U.S.C. §185(a)] (the LMRA). Acting on authority of 28 U.S.C. §1441(b), the appellee removed the action to the District Court as a matter of which that Court had original jurisdiction under 28 U.S.C. §1337 and section 301(a) of the LMRA [R. 3].

Timely notice of appeal was filed below [R. 95], and this Court's jurisdiction rests on 28 U.S.C. §1291.

Statement of Facts.

The appellant, Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO (the Union), is a labor organization within the meaning of the LMRA [R. 87, ¶2; R. 88, ¶3]. G. P. Thompson Electric, Inc. (the Employer) is the appellee and is an employer in an industry affecting commerce within the meaning of the LMRA [R. 88, ¶¶ 4-6].

Pursuant to section 301(a) of the LMRA, a suit to confirm an arbitration award was brought by the Union against the Employer [R. 5]. Upon cross motions based upon section 9 of the United States Arbitration Act [9 U.S.C. §9], the Union and the Employer respectively moved to confirm and vacate the arbitration award [R. 30; R. 77]. The District Court denied in part the motion to confirm, granted in part the motion to vacate, and granted judgment accordingly [R. 92-93].

The arbitration award [R. 20] had been rendered on March 8, 1965 by the Joint Electrical Industry Committee (the JEIC), a committee created pursuant to the parties' collective bargaining agreement, and composed of equal numbers of Union representatives and representatives of the Employer [R. 12, art. I, §5]. The award was based upon a grievance filed with the JEIC by the Union and upon a hearing held by the JEIC on December 18, 1964 [R. 21]. That part of the decision of the JEIC which was vacated held that the Employer had failed to make certain payments to the Union's Pension Trust Fund and Apprenticeship and Journeyman Training Trust Fund for the months of July through October 1964, and ordered the Employer to make the appropriate payments [R. 22].

In its answer to the Union's petition to confirm the award, the Employer contended, among other things, that the award contained claims which the Union should have asserted as compulsory counterclaims in a previous action between the parties relating to the validity of the trust funds [R. 35-36], and the Union's failure to have asserted these claims was alleged to constitute a waiver under Federal Rule of Civil Procedure 13(a).

This defense was accepted by the District Court as the basis for vacating that part of the arbitration award which required the Employer to make trust fund payments [R. 85]. The Court found that subsequent to the date these payments were due to the respective trust funds, an action was filed against the Union, with the Employer as one of the plaintiffs [R. 88-89, ¶¶8-9], in which the legality of both of the trust funds were attacked under section 302 of the LMRA [R. 42-43, ¶10(a), (b); R. 43, ¶12].¹ It was further found that the Union did not assert in the Employer's suit a counterclaim for the amounts due to the trust funds.

To the extent that the JEIC ordered the Employer to make payments to the trust fund, the District Court found in the present case that the JEIC exceeded its authority, on the ground that these amounts were compulsory counterclaims which the Union had waived. Part of the arbitration award was then confirmed by the Court [R. 93, ¶2]; however, that part which related to trust fund payments was vacated [*id.*, ¶1].

¹The trusts funds were found to be lawful [R. 60-65], *Auten v. Local 11, Int'l Bhd. of Elec. Workers*, 58 LRRM 2531 (S.D. Cal. 1965).

Specification of Error Relied on, and Question Presented.

The sole error made by the District Court was its ruling that the Union had a claim against the Employer for payments to the Union's trust funds at the time the Union filed its answer in the parties' previous litigation [R. 89, ¶12]. The question presented by this appeal is whether an arbitrable grievance is required to be asserted as a compulsory counterclaim in a lawsuit.

Summary of Argument.

The collective bargaining agreement between the parties provides for the arbitration of disputes which cannot be amicably adjusted. At the time the Union filed its answer in the first lawsuit, it had only a *grievance* against the Employer which it was entitled and required to process through arbitration in accordance with the parties' contract. Until such arbitration took place and an award issued, there was no claim justiciable by a court. Since an award was not rendered until some time subsequent to the judgment in the prior suit, the Union did not, at the time it filed its answer, have any "claims" which it was required to file as counterclaims.

ARGUMENT.

The Union Did Not Have Claims Which Could Have Been Asserted at the Time the Employer Sued the Union, and Thus Did Not Have Compulsory Counterclaims.

The District Court concluded that the Union had compulsory counterclaims which it waived by not asserting in the Employer's previous suit. Under Rule 13(a) of the Federal Rules of Civil Procedure, a compulsory counterclaim is one

“which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim”

The parties' agreement provides for the payment of certain sums by the Employer to the two trust funds mentioned in the award. Article I, section 5(a) of the agreement [R. 12] (which is reproduced in Appendix A of this brief) states that “the Joint Electrical Industry Committee is authorized to function as an Arbitration Board for all matters concerning questions, interpretations, disputes or violations of this Collective Bargaining Agreement.”² In section 6 of the same article, the parties are directed to take to the JEIC “all grievances or questions in dispute” which cannot be amicably settled (emphasis added).³

²The “final and binding” award of such a committee [R. 12, art. I, §8] is enforceable under section 301(a) of the LMRA. *General Drivers v. Riss & Co.*, 372 U.S. 517 (1963).

³The dispute over whether the Employer was in default in his trust fund payments was of course, arbitrable. See, e.g., *Association of Industrial Scientists v. Shell Dev. Co.*, 348 F.2d 385 (9th Cir. 1965); *Desert Coca Cola Co. v. General Sales Drivers*, 335 F.2d 198 (9th Cir. 1965). Further, this issue was not raised by the Employer.

Before the Union could assert in court a claim against the Employer for an alleged violation of the Employer's duty to make payments to the trust funds, the Union was obligated both by contract and by federal law to process its dispute through the collective bargaining agreement's grievance procedure.

E.g., Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) (employee may not bring action against employer for severance pay without exhausting grievance procedure);

Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 254 (1962) (employer may not sue union for damages for strike in breach of contract without exhausting grievance procedure);

Bonnot v. Congress of Independent Unions, 331 F.2d 355 (8th Cir. 1964) (union's suit against employer dismissed for failure to exhaust grievance procedure).

Not only did the Union have a *duty* to file a grievance rather than a lawsuit, but it had a *right* to have its grievance processed through "the means chosen by the parties for settlement of their differences under [the] collective bargaining agreement."

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

The arbitration award upon which the present suit is based was not rendered until March 8, 1965 (almost one month after the decision in the previous litigation [R. 60]); therefore, the Union did not have a "claim" against the Employer which it either could have asserted or was required to assert at the time it filed its answer in the previous case. "Claim" has variously been described as "a cause of action," *School Dist. No. 5 v.*

Lundgren, 259 F.2d 101, 104 (9th Cir. 1958), or "the aggregate of operative facts which give rise to a right enforceable in the courts," *Dery v. Weyer*, 265 F.2d 804, 807 (2d Cir. 1959). Since federal law requires that a party exhaust his contractual grievance procedures before coming to court, no "claim" would exist until such exhaustion took place.⁴

Conceivably, a "claim" inhered in the trustees of the respective trust funds at the time the Employer filed its suit. Under article VII, section 2 of the agreement [R. 18] a "legal action" to enforce collection is authorized without the necessity of utilizing the contract's grievance procedure; however, such action is limited to the trustees or their designated assignee or agent. The trustees were not parties to the prior litigation, and the Union was neither the trustees' assignee nor their agent. The Union's sole source of relief, therefore, was through the means it pursued.

Conclusion.

The District Court confirmed part of the arbitration award. That part which it vacated related solely to trust fund payments.

Other than the defense of compulsory counterclaims, each of the Employer's other defenses or grounds for

⁴Even in ordinary contract law, one of the required allegations for a claim for breach of contract, is that all conditions precedent have been performed. See *Halprin v. Babbitt*, 303 F.2d 138, 140 (1st Cir. 1962); *Marquardt-Glenn Corp. v. Lumelite Corp.*, 11 F.R.D. 175, 176 (S.D.N.Y. 1951); *Lewis v. Foppiano*, 150 Cal.App.2d 752, 755 (1957); 2 Moore, *Federal Practice* ¶8.17[6] at 1762-63 (2d ed. 1964); Cal. Civ. Code §1439; cf. Fed. R. Civ. Proc. Form No. 12 (93). The Union could not truthfully have alleged that it had exhausted the grievance procedure of the parties' contract.

See also Fed. R. Civ. Proc. 13(e), which by implication recognizes the existence of "immature" claims.

having the award vacated, had they been accepted by the Court, would have been a basis for setting aside the *entire* award.⁵ Only the defense of compulsory counterclaims was a basis for vacating the award *in part*. Implicit, therefore, in the Court's judgment is a rejection of the Employer's other defenses or grounds; and since no appeal was filed by the Employer, the Court's implicit findings are conclusive.

The only issue before this Court is one of law: Whether an arbitrable grievance is required to be asserted as a compulsory counterclaim in a lawsuit. Clearly, federal policy under section 301(a) of the LM-RA dictates a negative answer. This being so, and all of the Employer's other defenses having been conclusively ruled upon adversely to it, an order should issue directing the District Court to confirm the arbitration award.

Respectfully submitted

BRUNDAGE & HACKLER,
ALBERT BRUNDAGE,
JULIUS REICH,

Attorneys for Appellant.

⁵These grounds were (1) that the Employer was not bound to the collective bargaining agreement [R. 79, ¶9]; (2) that it did not receive adequate notice of the arbitration hearing [*id.*, ¶10]; and (3) that the arbitrators were guilty of partiality [*id.*, ¶11].

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS REICH

APPENDIX A.

Article I.

Joint Electrical Industry Committee.

Sec. 5. There shall be a Joint Electrical Industry Committee of three (3) representatives of the Employer, and three (3) representatives of the Union. It shall meet regularly at such stated times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

Sec. 5 (a). The Joint Electrical Industry Committee is authorized to function as an Arbitration Board for all matters concerning questions, interpretations, disputes or violations of this Collective Bargaining Agreement. This authority shall include the invoking of identifiable monetary damages, where appropriate, against contractors for violations of the referral procedure, wage scale, fringe benefits and subcontracting provisions of this Agreement that result in identifiable monetary damages being incurred by an employee covered by this Agreement. Damages may only be invoked by the Joint Electrical Industry Committee and shall be by majority decision of the Committee.

All monetary damages invoked against a contractor shall be used to provide awards to identifiable injured parties. The duties of the Joint Electrical Industry Committee in respect to the Inside Wiremen's Agreement shall be that of making determinations under the provisions of this Agreement, and in no event shall it have authority to terminate, change, alter or abrogate this Agreement or its provisions.

Sec. 6. All grievances or questions in dispute shall first be taken up for adjustment by the duly selected representatives of both parties to this Agreement. In the event these two representatives are unable to adjust any matter within 48 hours, they shall refer same to the Joint Electrical Industry Committee.

Sec. 7. A meeting shall be called at the earliest possible date. Should this Committee fail to agree or to adjust any matters within eight (8) calendar days of the first meeting, such shall then be referred to the "Council on Industrial Relations for the Electrical Contracting Industry of the United States and Canada." The Council's decision shall be final and binding.

Sec. 8. All matters coming before the Committee shall be decided by a majority vote. This decision shall be final and binding. Two (2) from each, the Union and the employers, shall be a quorum for the transaction of business, but each party shall have the right to cast the full vote of its membership, and it shall be counted as though all were present and voting.

Sec. 9. When any matter in dispute has been referred to the Joint Electrical Industry Committee or the "Council on Industrial Relations for the Electrical Contracting Industry of the United States and Canada" for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated until the decision is rendered.